seller could not be expected to give data as to widespread market conditions, and in many cases would not himself have such knowledge. Inquiry from him would probably be fruitless. It savors of refinement to say that failure to make such an inquiry, predestined to be unavailing, is a representation of complete approval as to the place of resale. On the other hand, the seller has given all the information that he could reasonably be expected to volunteer; and if he acts in good faith, the interests of the mercantile community may demand his protection strongly enough to warrant the resulting curtailment of the buyer's rights. This result is less harsh in view of the fact that, after all, it was the buyer's own default that created the necessity for the resale.

THE RESPONSIBILITY OF AN INVOLUNTARY BAILEE. — When goods are thrust unexpectedly upon one under circumstances which make it impossible for him to decide whether or not he will take them into his possession, what is his responsibility toward them? The cases involving the point are not common, but the frequency with which such a bailee is made the object of a fraud urges a clear determination of his status. Story early styled him an "involuntary bailee," [1] and intimated that he would have the same obligation of care toward the article while in his custody as a finder.[2] Later text-writers have assimilated the position of the two without further discussion.[3] The finder has in turn been rightly assimilated to the gratuitous, voluntary bailee.[4] The responsibilities of the latter include the exercise of at least slight diligence in the custody of the article, with a duty to redeliver to the bailor.[5] A misdelivery by such a bailee, though fraudulently procured and made without negligence on his part, is a conversion.[6] But is an involuntary

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Middle West to sell them had the buyer requested it. *Cf.* Ginn *v.* Coal Co., 143 Mich. 84, 106 N. W. 867 (1906). It is a matter of degree. Had the better market been less distant, reasonable care on the seller's part might have demanded that he seek that market, and failure to do so would be evidence of bad faith. See Anderson *v.* Frank, 45 Mo. App. 482, 487 (1891).

[1] See STORY, BAILMENTS, 4 ed., §§ 44a, 83a. (The fourth edition was the last to receive the personal supervision of Mr. Justice Story.)

[2] See § 83a. The learned author, it should be noted, was referring only to the care required in protecting the article, and not to the responsibility respecting a delivery.

[3] See HALE, BAILMENTS AND CARRIERS, 44; DOBIE, BAILMENTS AND CARRIERS, 52.

[4] Burns *v.* State, 145 Wis. 373, 128 N. W. 987 (1910); Dougherty *v.* Posegate, 3 Iowa 88 (1856). See Smith *v.* N. & L. R. R., 27 N. H. 86, 90 (1853). *Cf.* Cox *v.* Rixon, 50 L. T. 222 (1871). See also 50 L. T. 233.

The finder is under no obligation to assume possession of the article, economically advisable as it might be to do so. Consequently, when he does take it into his possession, he voluntarily undertakes the duties of a depositary. In jurisdictions where finders have a statutory lien, they are like bailees for hire. See Smith *v.* N. & L. R. R., *supra*, at 91. See HALE, *op. cit.*, 43; VAN ZILE, BAILMENTS AND CARRIERS, 2 ed., § 89.

[5] First judicially enunciated in Coggs *v.* Bernard, 2 Ld. Ray. 909, 914, 920 (1703). See Joseph H. Beale, Jr., "Gratuitous Undertakings," 5 HARV. L. REV. 222, 228. See also cases cited in note 6, *infra*.

[6] Jenkins *v.* Bacon, 111 Mass. 373 (1873); Rubin *v.* Huhn, 229 Mass. 126, 118 N. E. 290 (1918); Hicks *v.* Lyle, 46 Mich. 488, 9 N. W. 529 (1881); Hubbell *v.* Blandy,

bailee in the same situation? A recent decision [7] in New York holds that he is, and that consequently a misdelivery renders him liable in trover, without inquiry as to the care exercised.

The early statement by Story regarding the care required of an involuntary bailee to preserve the article while in his custody, is justified by the social interest in preventing the waste of goods. But it is another matter to impose the extraordinary liability for conversion upon an involuntary bailee who misdelivers without negligence.[8] To do so practically means that he who has goods thrust upon him insures that he will part with them to the bailor or the bailor's nominee only. This liability has been fastened upon a gratuitous, voluntary bailee, even where the bailment is for the bailor's sole benefit.[9] No cases have been found which indicate whether the suggested analogy between a finder and a gratuitous, voluntary bailee would be carried to this extent, but it is not unlikely that a misdelivery by a finder would be a conversion.[10] However, surely here the verge of legal severity is approached.[11] In the cases of the gratuitous, voluntary bailee and the finder, the interest in preventing further migration of property from its true owner prevails over the interest of the custodian in not being subjected to severe risks, because he has assumed possession. But that must be an unusual property interest which imposes a converter's liability upon one who has undertaken nothing, — in favor of a bailor who may himself have been at fault.[12] The personal interest of the bailee in being immune from unassumed, severe risks should not be so easily disregarded in favor of an interest in property.

There is little discussion in the cases on the liability of an involuntary

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87 Mich. 209, 49 N. W. 502 (1891); Wear *v.* Gleason, 52 Ark. 364, 12 S. W. 756 (1890). See COOLEY, TORTS, 632. *Cf.* SCHOULER, BAILMENTS, 3 ed., § 58.

[7] Cowen *v.* Pressprich, 192 N. Y. Supp. 242 (Sup. Ct., App. Term). For the facts of this case see RECENT CASES, *infra*, p. 890. The majority of two rely principally on Hiort *v.* Bott, L. R. 9 Ex. 86 (1874). There G, a former broker for A, ordered of A a consignment of goods to be sent to B, a reliable purchasing house which knew nothing of G. The goods were shipped under a delivery order to the order of consignor or consignee. G, representing himself to be the agent of A, called upon B, and B, intending to correct the "error," indorsed the delivery order to G, who absconded. A recovered against B in trover. The case is not a fair authority for the liability of an involuntary bailee, since B could have resisted possession. This is pointed out in the dissenting opinion in the principal case, and seems clear from the opinion of Baron Cleasby in Hiort *v.* Bott, *supra*, at 91. See also the argument of counsel in Hiort *v.* Bott, *supra*, at 88.

[8] There was no allegation of negligence in the complaint in the case under discussion, and the case is decided solely on the theory of absolute liability for trover. Mr. Justice Lehman, dissenting, found no evidence of negligence, had there been an allegation.

[9] See cases cited in note 6, *supra*.

[10] See Coke's *dictum* to this effect in Isaack *v.* Clark, 2 Bulst. 306, 312 (1615). But *cf.* ST. GERMAIN, DOCTOR AND STUDENT, Dial. 2, c. 38, "If a finder delivers to another to keep that runneth away with them he will be discharged." The cases cited in note 4, *supra*, did not involve liability for misdelivery.

[11] See Morton, J., dissenting, in Jenkins *v.* Bacon, 111 Mass. 373, 380 (1873).

[12] In Cosentino *v.* Dominion Express Co., 16 Man. L. R. 563, 567 (1905), the argument was made by counsel that an involuntary bailee, a finder, and a gratuitous, voluntary bailee should all be treated alike. Perdue, J. A., dissenting, adopted this view in discussing the care required to protect the article while in the bailee's custody. See pp. 572–575.

bailee for a misdelivery. In 1870, the Court of Exchequer held that a defendant, whom they classified as an involuntary bailee, had a duty of due care to effect a redelivery to the original owner, and having exercised such care, had no further liability for a misdelivery.[13] But there is no substantial authority in this country.[14] In a somewhat related situation — that of a carrier who becomes warehouseman by necessity when the consignee cannot be promptly found — there is a conflict of authority as to the liability for innocent misdeliveries.[15] Under modern conditions, the responsibility would seem appropriately to be that of an ordinary warehouseman.[16]

If the defendant bailee is to be held for his negligence only,[17] it would seem pertinent to inquire into the element of the plaintiff's fault. But an application of principles analogous to the doctrine of the "last clear chance" should prevent a negligent defendant from shielding his liability for a misdelivery under a plea of contributory negligence.[18] Where the responsibility for a misdelivery is absolute, as in the case of the gratuitous, voluntary bailee, and probably of the finder, the plaintiff's negligence could, of course, be no defense.[19]

On principle it seems that the interest of the involuntary bailee in being free from the extraordinary liability for conversion of goods, the

[13] Heugh *v.* London & N. W. Ry. Co., L. R. 5 Ex. 51 (1870). In two earlier cases, Stephenson *v.* Hart, 4 Bing. 476 (1828), and Duff *v.* Budd, 3 B. & B. 177 (1822), the court had left it to the jury to determine with what care the defendant involuntary bailee effected his delivery, treating the liability as one based on negligence. An unsatisfactory *nisi prius* case relating to an involuntary bailee is Howard *v.* Harris, 1 Cab. & El. 253 (1884). Here an involuntary bailee refused to redeliver to the bailor, assigning no reason other than that the goods could not be found, and the court held that the plaintiff had not made out a case for the jury. See a criticism of this case in 2 BEVEN, NEGLIGENCE, 2 ed., 907. These cases probably represent the only English authority on the point.

[14] In Krumsky *v.* Loeser, 37 Misc. 504, 75 N. Y. Supp. 1012 (1902), a misdelivery by an involuntary bailee was held not to be a conversion. The opinion, however, does not adequately treat the problem. In Weinstein *v.* Modern Silk Co., 170 N. Y. Supp. 529 (1918), there is a questionable *dictum* that, "It (defendant involuntary bailee) owed no obligation to the plaintiffs, because the latter's representative merely dropped the plaintiff's goods in defendant's premises." Foster, J., in Hall *v.* Boston & Worcester R. R. Corp'n, 14 Allen (Mass.) 439, 443 (1867), broadly declared that, "A misdelivery of property by any bailee to a person unauthorized by the true owner is of itself a conversion . . ." The majority opinion in the case under discussion concludes that Heugh *v.* London & N. W. Ry. Co., *supra*, has been disapproved in the United States, but the citations there given do not bear out this contention.

[15] See Oderdirk *v.* Fargo, 61 Hun, 418, 16 N. Y. Supp. 220 (1891); I. & St. L. R. R. Co. *v.* Herndon, 81 Ill. 143 (1876); Diamond Joe Line *v.* Carter, 76 Ill. App. 470 (1898). See also 2 HUTCHINSON, CARRIERS, 3 ed., §§ 681–686.

[16] *I.e.*, a misdelivery is a conversion. Hudmon *v.* Du Bose, 85 Ala. 446, 5 So. 162 (1888); P. & P. Union Ry. Co. *v.* Buckley, 114 Ill. 337, 2 N. E. 179 (1885); Fifth Nat. Bank *v.* Providence Warehouse Co., 17 R. I. 112, 20 Atl. 203 (1890). The carrier must contemplate the possibility of necessary temporary storage, when the consignee cannot be promptly found, and so cannot be said to have become warehouseman against its will.

[17] This view is intimated in SALMOND, TORTS, 5 ed., 347, footnote.

[18] *Sed quaere* what the result would be if the plaintiff intentionally thrust the article on the defendant without intending to make a gift. See Weinstein *v.* Modern Silk Co., 170 N. Y. Supp. 529 (1918).

[19] The contrary view expressed in Morris *v.* Third Ave. R. R., 1 Daly (N. Y.) 202, 205–206 (1862), is untenable.

possession of which he has not assumed, should prevail in the absence of some countervailing social interest calling for absolute liability; and that his responsibility should be limited to the exercise of reasonable care in the safe keeping of the goods and in effecting a return to the owner, with a corresponding lien for proper expenditures in so doing.

JURISDICTION TO TAX INCOME AS AFFECTED BY CHANGE OF DOMICIL. — When a taxpayer has acquired his domicil within the taxing state during the fiscal period for which an income tax is levied, the question has been raised as to the jurisdiction of this state to tax income received during the fiscal period but prior to the acquisition of the present domicil.[1] To arrive at an answer, it is necessary to consider the various forms of tax which may be imposed under the name of an income tax,[2] and the ability of the state to make the operation of each, in effect, retroactive.[3]

Income is property acquired by creation from other property or by transfer.[4] As a matter of theory, therefore, it is conceivable that an income tax may be laid as a personal tax upon the person receiving the income; as an excise upon the transaction by which it is gained; or as a property tax, either upon the property from which it has been created, or upon the income itself as property.

A personal tax may normally be levied at the domicil of the taxpayer at the time at which liability for the tax is created.[5] This is true even when the amount of the tax on the person is measured by the value of his property situated abroad,[6] except only if it be land [7] or tangible [8] personalty having a permanent [9] foreign *situs*.[10] But

[1] Hart *v.* Tax Commissioner, 132 N. E. 621 (Mass., 1921). For the facts of this case, see RECENT CASES, *infra*, p. 889.

[2] Often a single income tax law imposes more than one kind of tax. Thus a law which taxes the income of non-residents acquired within the state, and also the foreign acquisitions of residents, imposes either an excise or a property tax by the first provision and a personal tax by the second. The legislative intent as to the kind of tax must be ascertained by the practical effect. It not infrequently happens, however, that a limitation on the legislative power to impose one kind or another is created by some provision in the state constitution. See Opinion of the Justices, 220 Mass. 613 (1915).

[3] See Rugg, C. J., in Tax Commissioner *v.* Putnam, 227 Mass. 522, 526, 116 N. E. 904, 907 (1917); Maguire *v.* Tax Commissioner, 230 Mass. 503, 512, 120 N. E. 162, 166 (1918).

[4] See Shaffer *v.* Carter, 252 U. S. 37, 50 (1919); Opinion of the Justices, *supra*, at 624.

[5] Kuntz *v.* Davidson County, 6 Lea (Tenn.) 65 (1880). See 31 HARV. L. REV. 786.

[6] The tax is usually said to be based on the doctrine *mobilia sequuntur personam*. This doctrine is entirely a fiction, however, and the real nature of the tax is a tax on the person. McKeen *v.* Northampton, 49 Pa. 519 (1865). See 32 HARV. L. REV. 168.

[7] Louisville, etc. Ferry Co. *v.* Kentucky, 188 U. S. 385 (1902); Bittinger's Estate, 129 Pa. 338, 18 Atl. 132 (1889).

[8] Intangible personalty, even though it has such a "business *situs*" in another state as to be taxable there, may be included in the property with respect to which the owner is taxed at his domicil. Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54 (1917).

[9] The owner is taxable with respect to tangible personalty which has not acquired a permanent *situs* abroad. Coe *v.* Errol, 116 U. S. 517 (1886); Bemis *v.* Boston,

[10] Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194 (1905).